IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

I.T.A..No. 378 of 2004
Date of Decision: 1.2.2007

The Commissioner of Income Tax, Faridabad ....Petitioner through Mr.Yogesh Putney, Advocate

Versus

Sh. Anupam Kapoor ...Respondent through Mr. Akshay Bhan, Advocate

CORAM : HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE.
HON'BLE MR.JUSTICE RAJIVE BHALLA

1. Whether Reporters of Local Newspapers may be allowed to see the judgement ?
2. To be referred to the Reporters or not ?
3. Whether the judgement should be reported in the Digest ?

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VIJENDER JAIN, CHIEF JUSTICE

By this order, we propose to dispose of ITA's Nos.356 of 2004, 378 of 2004 and 308 of 2005, as common questions of law are sought to be raised by the revenue. The facts, however, have been extracted from ITA No.378 of 2004.

The revenue has filed this appeal. Aggrieved by the order passed by the ITAT, the following question of law was framed by the revenue :-

"Whether the Hon'ble ITAT on the facts and circumstances of the case has erred in law in confirming the order of the Ld. CIT (A) in deleting the addition of Rs.1,74,552/- by holding that the assessee discharged his onus of proving the genuineness of the transaction made by him, whereas, the assessee could not establish even the identity of the company whose shares the assessee alleged to have purchased and sold."

The assessment in this case was completed by the Assessing Officer under Section 143(3) read with Section 147 of the Income Tax Act. The said assessment was reopened on receipt of the intimation from the DDIT (Investigation), Gurgaon, stating that the long term capital gain declared by the assessee was false and the transaction was not genuine. A cheque had been taken by the beneficiary i.e. by paying cash equivalent to the cheque amount and the premium thereon. The Assessing Officer recorded reasons and issued notice under Section 148 of the Act. The assessee filed a return and during the course of the reassessment proceedings, the assessee submitted his reply and furnished evidence in support of his claim of long term capital gain. However, the Assessing Officer held that the assessee failed to lead evidence to support his claim of the long term capital gains. The Assessing Officer passed an order and the amount of Rs.1,74,552/- was considered as unexplained credit and the same was added in the income. The assessee preferred an appeal before the CIT (A). The CIT(A) vide order dated 30.12.2003 deleted the addition and further held that the Assessing Officer has not discharged his onus. The CIT (A) further held that there was no material or evidence with the Assessing Officer to come to the conclusion that the transaction shown by

the assessee was a bogus transaction. The CIT (A) further held that if a company was not available at the given address, it cannot conclusively prove that the company was non existent. The decision of the CIT (A) was challenged by the revenue before the ITAT. The ITAT on the basis of the material on record, held that purchase contract note, contract note for sales, distinctive numbers of shares purchased and sold, copy of share certificates and the quotation of shares on the date of purchase and sale were sufficient material to show that the transaction was not bogus but a genuine transaction. The purchase of shares was made on 28.4.1993 i.e. assessment year 1993-94 and that assessment was accepted by the department and there was no challenge to the purchase of shares in that year. The shares were sold through a broker, who was a registered broker of the stock exchange on the relevant date. It was also placed before the relevant Assessing Officer as well as before the ITAT that the sale proceeds have been accounted for in the accounts of the assessee and were received through account payee cheque. The ITAT took into consideration that the Assessing Officer had not dealt with all the documents placed before him and had simply presumed that the transaction was bogus.

The ITAT was right in rejecting the appeal of the revenue by holding that the assessee was simply a shareholder of the company. He had made investment in a company in which he was neither a director nor was he in control of the company. The assessee had taken shares from the market, the shares were listed and the transaction took place through a registered broker of the stock exchange. There was no material before the Assessing Officer, which could have lead to a conclusion that the transaction was, simpliciter a device to camouflage activities, to defraud

the revenue. No such presumption could be drawn by the Assessing Officer, merely on surmises and conjuctures. The ITAT rightly relied on **Vasanti Lal & Company V. CIT** 45 ITR 206 (SC), **M.O. Thomakutty V. CIT** 34 ITR 501 and **Mukand Singh V. Sales Tax Tribunal** 107 STC 300 (Punjab). It was for the Assessing Officer, who has reopened the assessment to have sought some evidence on record, to substantiate his formulation of consideration that the assessee has not filed a return bonafide. The ITAT also took into consideration that it was only on the basis of a presumption that the Assessing Officer concluded that the assessee had paid cash and purchased the cheque. In the absence of any cogent material in this regard, having been placed on record, the Assessing Officer could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the Assessing Officer. Therefore, the Assessing Officer could not have added income, which was rightly deleted by the CIT (A) as well as the ITAT. It is settled law that suspicion, howsoever, strong cannot take the place of legal proof, as has been held by Hon'ble the Supreme Court in the case of **Uma Charan Shaw and Ors. V. CIT** 37 ITR 271.

Learned counsel for the revenue has contended that the controversy in the present case, is covered by a decision of this Court in ITA No.256 of 2006 decided on 15.9.2006 **Jaspal Singh V. Commissioner of Income Tax.** We are afraid that the submission of learned counsel for the revenue does not hold good. In ITA No.256 of 2006, the following questions of law were framed :-

> "a) Whether on the facts and circumstances of the case, the ITAT was justified in confirming the action of authorities

below by upholding the addition made on account of impugned Gifts of Rs.2.00 lakhs, 1.70 lakh and .30 lakh ?

b) Whether, on the facts and circumstances of the case, the findings of ITAT are perverse and against the evidences on record thus unsustainable in law.

c) Whether the ITAT has misdirected itself in being influenced by irrelevant factors and applying erroneous criteria while deciding the issue of genuineness of the impugned gifts."

In the aforementioned judgement, this Court held that onus to establish that the gift was genuine and bonafide lay upon the assessee. The matter at issue was the nature of the gifts of money received by the assessee from Non Resident Indians and as there was sufficient material before the Assessing Officer, to doubt the bonafides of the transactions, it was rightly held that onus to establish the identity of the donor and the genuineness of the gifts lay upon the assessee. The situation in the present case, as noticed herein above is entirely different and relates to transactions of sale of shares, purchase whereof was never challenged by the revenue. Consequently, we are satisfied that no question of law, much less a substantial question of law arises for adjudication. Dismissed.

(VIJENDER JAIN)
CHIEF JUSTICE

1.2.2007
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(RAJIVE BHALLA)
JUDGE